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IN THE
Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

JOHN MCCOMISH, *et al.*,

Petitioners,

v.

KEN BENNETT, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. The instant case concerns Cato because the law at issue significantly burdens political speech and activity, the constitutional protection of which lies at the very heart of the First Amendment.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepened an existing circuit split and falls on the wrong side of it, disregarding long-established, fundamental First Amendment principles by upholding severe burdens on core political speech. At issue is Arizona's matching-funds statute. The statute gives additional public funding to candidates for political office whose opponents spend above a certain threshold amount.

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no entity or person, aside from the *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

In effect, the law compels candidates to facilitate the speech of their opponents as a condition of exercising their First Amendment rights.

The Cato Institute endorses petitioners' arguments and will not belabor them here. Regardless of any other considerations, the well-defined conflict among the courts of appeals regarding the constitutionality of matching-funds provisions warrants this Court's immediate review. *Compare Scott v. Roberts*, No. 10-13211, 2010 U.S. App. LEXIS 15897, at *32-33 (11th Cir. July 30, 2010), *Green Party v. Garfield*, No. 09-3760, 2010 U.S. App. LEXIS 14286, at *73 (2d Cir. July 13, 2010), *and Day v. Holahan*, 34 F.3d 1356, 1359, 1361-63 (8th Cir. 1994), *with McComish v. Bennett*, 611 F.3d 510, 516, 527 (9th Cir. 2010), *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 433, 437 (4th Cir.), *cert. denied sub nom.* 129 S. Ct. 490 (2008), *and Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 450-51 (1st Cir. 2000). Additional States have adopted or are considering similar matching-funds provisions. *See* Pet'n for a Writ of Cert. at 17-18, *McComish v. Bennett*, No. 10-239 (filed Aug. 17, 2010).

This brief underscores just how badly the Ninth Circuit's decision offends the Court's well-established campaign finance jurisprudence, as well as broader First Amendment principles. The Arizona statute is indistinguishable from the law invalidated in *Davis v. FEC*, because both "impose[] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right" by correlating "the vigorous exercise of the right" to spend in support of one's campaign with "fundraising advantages for opponents in the competitive context of electoral politics." *Davis v. FEC*, 128 S. Ct. 2759, 2771-72

(2008). The decision, moreover, flies in the face of this Court's established precedents that have consistently found expenditures for political campaigns to be highly protected speech.

Perhaps most importantly, the decision below contradicts cardinal First Amendment principles regarding laws that impose negative consequences, whether direct or indirect, on the exercise of free speech. Time and again, the Court has made clear that the government cannot enact schemes that deter speech that the government cannot ban directly. *E.g.*, *Speiser v. Randall*, 357 U.S. 513, 526 (1958). The Ninth Circuit disregarded volumes of U.S. Reports to reach the untenable, opposite conclusion. In short, the Ninth Circuit's decision is ill-reasoned, conflicts with decades of this Court's precedents, and must be corrected.

ARGUMENT

I. THE DECISION BELOW CANNOT BE SQUARED WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS.

This Court has not minced words in describing the importance of a political candidate's speech: "The First Amendment ''has its fullest and most urgent application' to speech uttered during a campaign for political office.''" *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). Nonetheless, the Arizona statute punishes candidates for speaking too much. The Ninth Circuit's decision upholding the law clashes with this Court's campaign finance decisions, including, most pertinently, *Davis v. FEC*. This Court should grant certiorari and vindicate the First Amendment's core protections.

A. The Arizona Statute Cannot Be Distinguished From the Law Struck Down in *Davis v. FEC*.

1. *Davis v. FEC* leaves no doubt that the Arizona statute transgresses the First Amendment. In *Davis*, the challenged Bipartisan Campaign Reform Act (BCRA) provisions allowed an opponent of a candidate who self-financed his own campaign with over $350,000 to "receive individual contributions at treble the normal limit," even "from individuals who ha[d] reached the normal aggregate contributions cap." *Davis*, 128 S. Ct. at 2766. The law also allowed such opponents to "accept coordinated party expenditures without limit." *Id.* The Court struck down the law, explaining that it "impose[d] an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right." *Id.* at 2771-72. That penalty took the form of "fund-raising advantages for opponents" granted solely because a candidate engaged in the "vigorous exercise of the right" to spend and to speak in support of his campaign. *Id.*

The Arizona statute suffers from the same fatal flaw. It similarly creates a more favorable funding regime for candidates whose opponents spend above a certain threshold amount. It provides for disbursal of additional funds to candidates participating in a public financing program whose nonparticipating opponents spend more than the initial grant to program participants. *See McComish*, 611 F.3d at 516. By rewarding the opponents of nonparticipating candidates that "vigorously exercise the right" to spend money on their campaigns, the Arizona statute substantially burdens free speech in violation of the First Amendment.

The main difference between the Arizona statute and the BCRA provisions at issue in *Davis* makes the Arizona statute *more* burdensome. *Cf. Green Party*, 2010 U.S. App. LEXIS 14286, at *82 (noting that Connecticut's matching-funds scheme imposed a "penalty" that was "*harsher* than the penalty in *Davis*") (emphasis added). Whereas the law in *Davis* merely gave opponents of candidates who spent above the threshold the opportunity to collect higher contributions (with time and effort), *see Davis*, 128 S. Ct. at 2766, the Arizona statute actually dispenses funds to opponents of such candidates, *see McComish*, 611 F.3d at 516, making the harsh consequences of speech more certain and therefore more chilling.

2. The Ninth Circuit's attempt to distinguish *Davis* is specious. The Ninth Circuit reasoned that the law in *Davis* "was unconstitutional because it specifically sought to disadvantage the rich" and thereby "singled out the speakers to whom it applied based on their identity." *Id.* at 522. Tested against that misreading, the Arizona statute was permissible, the Ninth Circuit held, because it did not distribute matching funds "specifically to the opponents of wealthy candidates" and thus did not make "identity-based distinctions." *Id.* But *Davis* did not create a novel equal protection rule or issue a narrow holding shielding only a wealthy candidate's expenditures from disfavored treatment. Rather, *Davis* enforced the well-established principle that "the First Amendment simply cannot tolerate" restrictions "upon the freedom of a candidate"—rich or poor—"to speak without legislative limit on behalf of his own candidacy." *Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (per curiam); *see Davis*, 128 S. Ct. at 2771 (noting "*Buckley*'s emphasis on the fundamental nature of

the right to spend personal funds for campaign speech").[2]

The Arizona statute disregards that principle and burdens even more protected speech than the law struck down in *Davis* because it applies to all non-participating candidates, regardless of their wealth. Indeed, the Arizona statute would chill even a modest spending of personal funds by a candidate if his overall campaign expenditures approached the trigger point. This burden on a candidate's speech is utterly incompatible with the "right to spend personal funds for campaign speech." *Davis*, 128 S. Ct. at 2771.

Finally, the Arizona statute is not helped by the fact that it awards matching funds when a non-participating candidate's financing comes from third-party contributions, rather than solely from his personal funds. *Contra McComish*, 611 F.3d at 522. The breadth of the Arizona statute does not salvage it. To the contrary, because the Arizona statute applies even when a candidate's fundraising success is due to wide popular support, *see id.* at 516, 522, it threatens to impair the ability of thousands of

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[2] The Ninth Circuit's misjudgment is evident in what its reasoning would justify. By the Ninth Circuit's logic, a State seemingly could grant a publicly funded candidate *double* the funds (or more) spent by the opponent. After all, such a scheme would make no "identity-based distinctions" disfavoring wealthy candidates, *McComish*, 611 F.3d at 516, would simply "enable" more speech, *id.* at 524, and would advance the State's interest in "encourag[ing] participation in its public funding scheme," *Id.* at 526. Even though such massive state-assistance to a publicly funded opponent would obviously punish a nonparticipating candidate's speech, absent evidence of "actual[] chill[ing]," *id.* at 522-23, the Ninth Circuit would sustain that law.

grassroots contributors to make their voices heard. The Arizona statute "operate[s] to constrain campaigning by candidates who raise sums in excess of the spending ceiling," and thus runs afoul of this Court's clear holding in *Buckley*, 424 U.S. at 20. Limits on a campaign's expenditures, no less than limits on a candidate's personal expenditures, "impose . . . severe restrictions on protected freedoms of political expression and association," and therefore are subject to strict scrutiny. *Id.* at 19-23; *see also id.* at 55-58 (striking down limits on campaign expenditures). The Court should grant certiorari to uphold its precedent.

B. The Decision Below Conflicts With This Court's Broader Campaign Finance Jurisprudence.

The decision below especially warrants review because it clashes with this Court's broader, well-established protections of core political speech. As this Court has made clear, "[s]peech is an essential mechanism of democracy," for "it is the means to hold officials accountable to the people." *Citizens United*, 130 S. Ct. at 898. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Id.* Accordingly, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Id.*

Furthermore, this Court has specifically protected campaign expenditures as political speech, the very type of speech burdened by the Arizona statute. "The First Amendment protects more than just the individual on a soapbox and the lonely pamphleteer." *Id.* at 918 (Roberts, C.J., concurring). It also protects the political candidate and the expenditures needed

to mount a campaign. Indeed, the Court has indicated that "expenditure limitations 'impose significantly more severe restrictions on protected freedoms of political expression and association than' do contribution limitations." *Randall v. Sorrell*, 548 U.S. 230, 241 (2006) (plurality opinion) (quoting *Buckley*, 424 U.S. at 23). This reflects the reality that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." *Buckley*, 424 U.S. at 19. Thus, the speech burdened by the Arizona statute is core political speech of the highest order.

Appropriately, "[l]aws that burden" a right so vital to our system of government as "political speech are 'subject to strict scrutiny.'" *Citizens United*, 130 S. Ct. at 898 (quoting *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 464 (2007)). This most searching standard of review requires the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (quoting *Wisconsin Right to Life*, 551 U.S. at 464) (internal quotation marks omitted). This Court has never suggested that limits on expenditures are anything but severe burdens, and certainly has never suggested that they are comparable to disclosure requirements and therefore subject only to intermediate scrutiny, as the Ninth Circuit held. *See McComish*, 611 F.3d at 525.

Given that the Arizona statute severely burdens expenditures, it must also be subjected to strict scrutiny. *See Davis*, 128 S. Ct. at 2772. The Court should grant certiorari to clarify that matching-fund provisions like the Arizona statute, which substantially burden core speech and are not

narrowly tailored to serve a compelling state interest, violate the First Amendment.

II. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT STRIKING DOWN LAWS THAT BURDENED PROTECTED SPEECH BY TYING IT TO NEGATIVE CONSEQUENCES.

Not only does the decision below run counter to established campaign finance case law, it also tramples principles that undergird this Court's wider First Amendment jurisprudence. Certiorari should be granted.

A first principle of our constitutional system is that the state may not, by cunning manipulation of the laws, circumvent rights guaranteed to the people. *See Elrod v. Burns*, 427 U.S. 347, 359 (1976) (forbidding state action in which "[t]he belief and association which government may not ordain directly are achieved by indirection"); *Speiser*, 357 U.S. at 526 (invalidating law because it "produce[d] a result which the State could not command directly").

This principle is particularly strong in the First Amendment context. The government cannot, using statutes that stop just short of actual prohibition, "deter[] . . . speech which the Constitution makes free." *Id.* Such a state of affairs would expose one of our most precious liberties to the power of any government clever enough to veil its commands in the form of suggestions, encouragement, and threats. Thus, this Court has often struck down laws that impinge on the exercise of free speech by conditioning exercise of that right on acceptance of negative consequences. While the laws the Court has invalidated vary greatly in the type and magnitude of the penalty imposed on speech, a single theme

emerges from this Court's unconstitutional conditions cases: The state may not prevent through the threat of negative consequences the speech it cannot ban directly. And yet, this is precisely the operation of the Arizona statute approved by the decision below.

A. The State Cannot Condition Free Speech on the Promotion of a Viewpoint Contrary to the Speaker's.

The Court has long made clear that conditioning the exercise of First Amendment rights on promotion of a viewpoint contrary to the speaker's position substantially burdens speech and cannot be tolerated. In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a "right to reply" law that provided that if a political candidate "is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges." 418 U.S. 241, 244 (1974). Noting that "[g]overnmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers," the Court struck down the law because a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* at 256-57 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)).

The Court reached the same conclusion in *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986) (plurality opinion). In that case, a state agency required "a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagree[d]." *Id.* at 4. The Court found a First Amendment violation because the utility was forced to "contend with the

fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views," and that the utility "'might well conclude' that . . . 'the safe course is to avoid controversy'" and remain silent. *Id.* at 14 (quoting *Tornillo*, 418 U.S. at 257).

The Arizona statute presents the very dangers that this Court warned of in *Tornillo* and *Pacific Gas*. An Arizona candidate cannot spend over a certain threshold amount without facilitating his opponent's promotion of a contrary viewpoint. The Arizona law, by affixing penalties to a candidate's expenditures above the threshold amount, "operates as a command in the same sense as a statute or regulation forbidding [a candidate] to publish specified matter." *Tornillo*, 418 U.S. at 256. It forces a candidate "to help disseminate hostile views," *Pacific Gas*, 475 U.S. at 14, as a condition of exercising his or her First Amendment rights. As a result of the penalties it imposes on speech, it "inescapably 'dampens the vigor . . . of public debate,'" *Tornillo*, 418 U.S. at 257 (quoting *New York Times*, 376 U.S. at 279).

In *Davis v. FEC*, the Court recognized the application of *Pacific Gas* to the campaign finance law at issue. *See* 128 S. Ct. at 2772. The Court should do the same here and affirm that provisions, like the Arizona statute, which condition free speech on the promotion of a contrary viewpoint cannot be tolerated under the Constitution.

B. The Decision Contradicts the Court's Wider Unconstitutional Conditions Jurisprudence.

In numerous additional contexts, the Court has struck down laws that, while not limiting the freedom of speech directly, attached conditions that unduly burdened its exercise. The negative consequences at

issue in these cases varied in kind and degree, but the cases make clear that even relatively insignificant conditions on speech can offend the Constitution. Judged against these cases, the substantial consequences triggered under the Arizona statute by a non-participating candidate's core political speech cannot be tolerated.

The Court has expressed the unconstitutional conditions principle in public benefits cases. In *Perry v. Sindermann*, for example, the Court declared that a State "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." 408 U.S. 593, 597 (1972). Likewise, in *Elrod v. Burns*, the Court stated that its "decisions have prohibited conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, *however slight the inducement* to the individual to forsake those rights." 427 U.S. at 358 n.11 (emphasis added). Thus even conditions that "slight[ly]" chill the exercise of First Amendment rights can constitute impermissible burdens.

In *Perry*, a teacher who had been employed by a public college on a year-to-year basis alleged that the college's "decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech." 408 U.S. at 595. The Court declared that "if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Id.* at 597. Despite the fact that the teacher had no contractual right to renewal of his contract, the Court held that "the nonrenewal of a nontenured public

school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." *Id.* at 598.

The Arizona statute likewise inhibits speech by tying it to a significant burden—increased funding to a candidate's political opponent. Because the Arizona statute links the exercise of core First Amendment rights to a hardship for the speaker, the Court should grant certiorari to strike down the statute.

This limit on unconstitutional conditions applies with even greater force when the speech at issue "is 'indispensable to the discovery and spread of political truth.'" *FEC v. League of Women Voters*, 468 U.S. 364, 383 (1984) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). In such cases, the Court has been "especially careful in weighing the interests that are asserted in support of th[e] restriction and in assessing the precision with which the ban is crafted." *Id.* Thus, in *League of Women Voters*, the Court invalidated a law that conditioned funding from the Corporation for Public Broadcasting on a television or radio stations' refusal to "engage in editorializing," *id.* at 366 (internal quotation marks omitted). The Court found that the law impermissibly "operate[d] to restrict the expression of editorial opinion on matters of public importance" by attaching negative consequences on the stations' speech. *Id.* at 375. In that way, the Court found, the stations were not truly free to speak as they wished. *See id.* at 402. Accordingly, the law violated the First Amendment by infringing on core political speech, and the Court struck it down.

The Arizona statute commits the same offense. It imposes negative consequences on core political speech and thereby interferes with "the liberty to discuss publicly and truthfully all matters of public

concern without previous restraint or fear of subsequent punishment." *Id.* at 381-82 (internal quotation marks omitted). Just as the law in *League of Women Voters* made it difficult for the stations to survive financially without curtailing their speech, the Arizona statute discourages candidates from discussing the pressing issues of the day to the full extent they believe necessary. As it was in *League of Women Voters*, the Court should be highly skeptical of a law that imposes such burdens on political speech.

The Court's decision in *Speiser v. Randall* likewise demonstrates how even minimally burdensome conditions on speech can run afoul of the First Amendment. In that case, the Court struck down a California law that denied a tax exemption to persons who could not carry the state-imposed burden to show they refrained from advocating the overthrow of the government. 357 U.S. at 515-17. The Court noted that the law burdened speech, since "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.* at 519. Even assuming for the sake of argument that the law applied only to illegal (and therefore unprotected) speech, the Court nonetheless found a constitutional violation because California shifted the burden of proof to the taxpayer. *See id.* at 528-29. Describing "[t]he vice of the [California] procedure," the Court explained, "[t]he man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526. Even though the California law required only proof that one's speech was lawful, and pertained only to the availability of a

tax exemption, the Court held the statute unconstitutional.

In contrast, the Arizona statute poses a significantly greater burden on free speech. Whereas a speaker under the California law could avoid being denied the tax exemption simply by proving that his speech was legal, the Arizona law provides no means to escape its strictures: A candidate who spends above the threshold amount *will* trigger additional funding for the candidate's opponent. The Arizona statute fails to "provide any way in which a candidate can exercise [his free speech] right without abridgement." *See Davis*, 128 S. Ct. at 2772. Moreover, the nature of the Arizona statute's penalty strikes at the heart of the First Amendment. It affects not the speaker's tax bill, but the speaker's prospects in a political election—a central event in our republican form of government. Because the *Speiser* Court found the California statute imposed an unconstitutional condition, there can be no doubt that the Arizona statute does likewise and should be invalidated.

While the particular consequences attached to speech in these cases differed, a consistent rule runs throughout them: Tying burdensome consequences to protected speech is no more permissible than directly banning speech itself. This rule is strong; even consequences which result in mere "slight . . . inducement[s]" to curtail speech, *Elrod*, 427 U.S. at 358 n.11, can be impermissible under this Court's precedents. And the rule gains additional strength when the speech in question is political. *League of Women Voters*, 468 U.S. at 383.

The Arizona statute significantly impairs core political speech by attaching an inescapable condition to it. It therefore falls into the most forbidden

category of unconstitutional conditions and should be struck down. The Ninth Circuit failed to recognize this vital part of First Amendment jurisprudence. And numerous States have adopted or are considering matching-funds statutes that similarly burden speech in disregard for this Court's precedent. This Court's review is urgently needed.

CONCLUSION

For these reasons, and those stated by petitioners, the petitions for a writ of certiorari should be granted.

Respectfully submitted.

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